IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Grewal v. Kruger,* 2025 BCSC 572

Date: 20250328
Docket: S242552
Registry: Vancouver

2025 BCSC 572 (CanLII)

Between:

Paramjit Singh Grewal

Plaintiff

And

Dylan Kruger and City of Delta

Defendants

Before: The Honourable Justice Chan

Reasons for Judgment

Counsel for the Plaintiff:	M. Cooperwilliams
Counsel for the defendant, Dylan Kruger:	K.R. Zimmer
Counsel for the defendant, City of Delta:	G. Cameron
Place and Date of Hearing:	Vancouver, B.C. February 20, 2025
Place and Date of Judgment:	Vancouver, B.C. March 28, 2025

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Introduction

[1] Both defendants, City of Delta ("Delta") and Dylan Kruger, bring an application to strike portions of the plaintiff's Notice of Civil Claim ("NOCC") and Reply. The defendant Delta also brings an application to set aside the plaintiff's appointment to examine for discovery Mr. George Harvie, the Mayor of the City of Delta, as the representative of Delta.

[2] The plaintiff Mr. Paramjit Singh Grewal was employed by Delta from November 5, 2018 to March 21, 2024. His employment was terminated without cause following a meeting of the Delta municipal council, a portion of which was held *in camera*, on March 18, 2024. The plaintiff relies on an audio recording made by Randy Mann during a meeting with Mr. Kruger on or about March 26, 2024, where it is alleged Mr. Kruger made disparaging remarks about the plaintiff. Mr. Kruger is a council member of Delta.

[3] The plaintiff filed a NOCC against both defendants on April 19, 2024. The plaintiff as against Delta claims for damages for breach of his employment contract, breach of Delta's duties of good faith in termination and honesty in performance of the employment contract, and damages for negligence for failing to ensure Mr. Kruger complied with his obligations of confidentiality. As against Mr. Kruger, the plaintiff claims damages for defamation.

Factual Background

[4] Pursuant to an employment contract from November 5, 2018, Delta agreed to employ the plaintiff as Director of Intergovernmental Relations and Community Outreach. The contract had a termination date of December 31, 2022, unless terminated earlier in accordance with the contract. On November 10, 2022, Delta agreed to employ the plaintiff as Director of Economic Development and Stakeholder Relations (Mayor's Office). A second employment contract was signed with a termination date of December 31, 2026. The employment contract provided for early termination for cause or if without cause, by providing a severance payment equivalent to one month's base salary for each completed year of service to a maximum of six

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months' base salary less deductions. At the time of his termination in March 2024, the plaintiff's salary was $234,000 per annum with a vehicle allowance of $748 per month, with pay for vacation time or earned extra hours.

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[5] Delta's council held a public meeting on March 18, 2024 at Delta city hall. Towards the end of the public meeting, two council members moved and seconded to proceed with an addition to the agenda in a closed meeting, citing s. 90(c) of the *Community Charter*, S.B.C. 2003, c.26. Pursuant to s. 90(c) of the *Community Charter*, part of a council meeting may be closed to the public if the subject matter being considered relates to "labour relations or other employee relations". The meeting then proceeded *in camera*. Pursuant to s. 117 of the *Community Charter*, the subject matter of the *in camera* meeting is confidential.

[6] As I understand it, the theory of the plaintiff is that his termination was discussed during this *in camera* meeting.

[7] That same evening, the plaintiff was contacted by the City Manager and advised not to attend work the next day or use any City assets, including email. On March 21, 2024, the plaintiff's employment was terminated without cause. Delta offered to pay severance if the plaintiff signed a release. The plaintiff did not accept the offer.

[8] On April 30, 2024, Delta provided the plaintiff a severance payment of $137,164.29, equivalent to five months' base salary, vacation pay and extra hours, less deductions.

[9] On or about March 25, 2024, Mr. Kruger and Mr. Mann were in contact. Mr. Kruger and Mr. Mann met in person on March 26, 2024. It is disputed on the pleadings who initiated the meeting and what exactly was said. At the end of the meeting, Mr. Mann appeared to stop a recording on his phone. The plaintiff alleges the statements made by Mr. Kruger during this meeting are defamatory.

[10] The plaintiff seeks damages from Delta for breach of his employment contract, damages for breach of Delta's duties of good faith in termination of the employment

contract and honesty in performance of the employment contract, damages for vicarious liability for the actions of Mr. Kruger and damages for negligence. The plaintiff seeks damages from Mr. Kruger for defamation.

The Plaintiff's Pleadings

[11] The defendants seek to strike out the following underlined words from the statement of facts section of the NOCC:

> …
>
> Part 1: Statement of Facts
>
> …
>
> 7. The decision by the Defendant City to terminate the Plaintiff's employment followed and was the result of a confidential, in camera meeting of the City Council on March 18, 2024 at which the issue was discussed ("the *In Camera* Meeting").
>
> 8. The Defendant Kruger attended and participated in the *In Camera* Meeting.
>
> …
>
> 13. At the time of the Conversation the Defendant Kruger was subject to and bound by:
>
> a. The Code of Ethics for Council Members established by the Defendant City ("the Code of Ethics"). The Code of Ethics included the following terms:
>
> > …
> >
> > iv. 10. Confidential Information
> >
> > Members shall respect the confidentiality of information concerning property, personal or legal affairs of the City of Delta. They shall neither disclose confidential information without proper authorization, nor use such information to advance in their personal, financial or other private interests.
>
> b.The Community Charter [SBC 2003]. Section 117(1)(b) of the Community Charter provides:
>
> > i. Confidentiality
> >
> > 117(1) A council member or former council member must, unless specifically authorized otherwise by council,
> >
> > (b) keep in confidence information considered in any part of a council meeting or council committee meeting that was lawfully closed to the public, until the council or committee discusses the information at a meeting that is open to the public or releases the information to the public.

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[12] The defendants seek to strike out the following underlined words from the legal basis section of the NOCC:

> Part 3: Legal Basis
>
> …
>
> 5. The Defendant City engaged in conduct in the course of termination of the Plaintiff's employment that was unfair, untruthful, misleading, and unduly insensitive and breached its duty to perform the Employment Contract honestly, candidly and in good faith, by, *inter alia:*
>
> ….
>
> d. Failing to ensure that the Defendant Kruger complied with his obligations pursuant to the Community Charter;…
>
> 6. The Defendant City is liable to the Plaintiff in negligence because it:
>
> …
>
> b. Failed to take reasonable steps to:
>
> …
>
> vi. Ensure that the Defendant Kruger complied with the Community Charter; …

[13] The defendants seek to strike out the following underlined words from the plaintiff's Reply:

> 6. In answer to paragraph 1 of Division 3 of the Response to Civil Claim of Delta, the Notice of Civil Claim pleads material facts which ground the Plaintiff's action in negligence. In order to eliminate any uncertainty about those material facts though, the Plaintiff pleads:
>
> a. Delta owed the Plaintiff a duty of care to take reasonable steps to ensure that Kruger did not make the Statements, did not defame him, and did not breach the Code of Ethics and the Community Charter; …

Application to Strike Portions of the Plaintiff's Pleadings

[14] Both defendants bring an application pursuant to Rule 9-5 of the *Supreme Court Civil Rules,* B.C. Reg. 168/2009 [*SCCR*] to strike portions of the plaintiff's NOCC and the plaintiff's Reply alleging that Delta was negligent in failing to ensure Mr. Kruger maintained confidentiality of what was discussed during the *in camera* meeting.

[15] They submit this claim of negligence and related averments should be struck pursuant to R. 9-5(1) of the *SCCR* on the basis that it discloses no reasonable cause

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of action, is unnecessary, scandalous, frivolous and vexatious, and constitutes an abuse of process of the court. Rule 9-5 sets out the following:

> **Rule 9-5 – Striking Pleadings**
>
> **Scandalous, frivolous or vexatious matters**
>
> (1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
>
> (a) it discloses no reasonable claim or defence, as the case may be,
>
> (b) it is unnecessary, scandalous, frivolous or vexatious,
>
> (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
>
> (d) it is otherwise an abuse of process of the court,
>
> and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.
>
> **Admissibility of evidence**
>
> (2) No evidence is admissible on an application under subrule (1) (a).
>
> …

[16] The well-established test on an application to strike under R. 9-5(1)(a) is whether, assuming the truth of the pleaded facts, it is plain and obvious that it discloses no reasonable cause of action: *Odhavji Estate v. Woodhouse*, 2003 SCC 69 at para. 15, citing *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at p. 980. Evidence is not admissible on such an application: R. 9-5(2).

[17] A claim will only be struck if it cannot be amended to cure the defect: *Strohmaier v. British Columbia (Attorney General)*, 2015 BCSC 1189 at para. 17. Further, the fact that a claim is novel does not mean it should be struck. A novel but arguable claim ought to be permitted to proceed to trial: *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 21. This means that the defendants face a high bar to succeed in its application.

[18] Unlike R. 9-5(1)(a), applications to strike based on R. 9-5(1)(b) and (d) do not proceed on the basis that the facts pleaded are true but permit evidence: *Krist v. British Columbia*, 2017 BCCA 78 at para. 24.

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[19] Rule 3-1(2) states that a claimant must set out each of: (a) “a concise statement of the material facts giving rise to the claim”; (b) “the relief sought by the plaintiff against each named defendant”; and (c) “a concise summary of the legal basis for the relief sought”.

[20] Pleadings are foundational. They guide the litigation process. This is true in relation to the discovery of documents, examinations for discovery, many interlocutory applications and the trial itself: *Mercantile Office Systems Private Limited v. Worldwide Warranty Life Services Inc.*, 2021 BCCA 362 at para. 21.

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Should the underlined portions of the pleadings be struck?

[21] The defendants argue the underlined portions they seek to strike do not disclose a cause of action against them and are also unnecessary. As I understand it, the defendants argue s. 117 of the *Community Charter* does not impose a duty of care on Delta to the plaintiff. A breach of confidentiality is a matter to be determined and disciplined internally by council through censure, and nothing in s. 117 imposes a duty of care from the municipality towards private individuals. Further, the defendants argue the plaintiff has not pled any material facts or law which support Delta owing a private law duty of care to ensure compliance with confidentiality that can give rise to a claim in negligence. The defendants argue that a failure of a municipality to enforce a law does not give rise to a private cause of action in negligence.

[22] The plaintiff argues the defendants seek to strike out portions of his claim based on a misguided assumption that the proceedings of the *in camera* meeting are subject to privilege, which has not yet been determined. The plaintiff argues in his application response “this assumption that the proceedings of in camera meetings are subject to some sort of privilege and cannot, therefore, found claims in this Action is wrong in law”. The plaintiff disagrees the jurisprudence is clear that there can be no private law duty of care owed by a municipality to an individual in these circumstances, and argues this is an issue which needs to be determined at trial on the basis of evidence.

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Analysis

[23] The portions the defendants seek to strike can fairly be described as those portions of the claim alleging an action in negligence against Delta for its failure to ensure Mr. Kruger abided by the confidentiality provisions of s.117 of the *Community Charter*. The plaintiff argues these portions of the claim are relevant to whether Delta was negligent in failing to take reasonable steps to address the risk of disclosure by Mr. Kruger of information obtained during the *in camera* meeting. The plaintiff's claim is Delta owed him a duty to take reasonable steps to ensure Mr. Kruger did not breach the confidentiality provisions of the *Community Charter*.

[24] A threshold issue for any claim in negligence is establishing a duty of care between the alleged tortfeasor and the plaintiff who alleges they have been harmed by the defendant's actions. This is so whether the defendant is a public or a private body. In *Nelson (City) v. Marchi*, 2021 SCC 41, the Supreme Court of Canada explained:

> [15] The foundation of the modern law of negligence is the neighbour principle established in *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.), under which "parties owe a duty of care to those whom they ought reasonably to have in contemplation as being at risk when they act" (*Rankin (Rankin's Garage & Sales) v. J.J.*, 2018 SCC 19, [2018] 1 S.C.R. 587, at para. 16). The neighbour principle does not discriminate between private and public defendants — it is applicable to both alike, subject to any contrary statutory provision or common law principle (*Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537, at para. 22).
>
> [16] In Canada, the *Anns/Cooper* test provides a unifying framework to determine when a duty of care arises under the wide rubric of negligence law, including for allegations of negligence against government officials. But as *Cooper* and subsequent cases make clear, the framework applies differently depending on whether the plaintiff's claim falls within or is analogous to an established duty of care or whether the claim is novel because proximity has not been recognized before.
>
> [17] In novel duty of care cases, the full two-stage *Anns/Cooper* framework applies. Under the first stage, the court asks whether a *prima facie* duty of care exists between the parties. The question at this stage is whether the harm was a reasonably foreseeable consequence of the defendant's conduct, and whether there is "a relationship of proximity in which the failure to take reasonable care might foreseeably cause loss or harm to the plaintiff" (*Rankin's Garage*, at para. 18). Proximity arises in those relationships where the parties are in such a "close and direct" relationship that it would be "just and fair having

regard to that relationship to impose a duty of care in law upon the defendant" (*Cooper*, at paras. 32 and 34).

[18] If there is sufficient proximity to ground a *prima facie* duty of care, it is necessary to proceed to the second stage of the *Anns/Cooper* test, which asks whether there are residual policy concerns outside the parties' relationship that should negate the *prima facie* duty of care (*Cooper*, at para. 30). As stated in *Cooper*, at para. 37, the residual policy stage of the *Anns/Cooper* test raises questions relating to "the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally", such as:

> Does the law already provide a remedy? Would recognition of the duty of care create the spectre of unlimited liability to an unlimited class? Are there other reasons of broad policy that suggest that the duty of care should not be recognized?

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[25] The plaintiff's pleading with respect to negligence is found in part at para. 6 of his Part 3: Legal Basis:

> 6. The Defendant City is liable to the Plaintiff in negligence because it:
>
> a. Failed to take reasonable steps to establish and enforce effective policies and procedures to address the risk of disclosure by Council members of information like that which was included in the Statements:
>
> b. Failed to take reasonable steps to:
>
> v. Ensure that the Defendant Kruger complied with the Code of Ethics;
>
> vi. Ensure that the Defendant Kruger complied with the Community Charter; and
>
> vii. Prevent the Defendant Kruger from making the Statements.
>
> [Emphasis added.]

[26] The defendant Delta seeks to strike the underlined portion in this paragraph as well as a portion of paragraph 5(d) set out earlier, referencing a failure by Delta to ensure Mr. Kruger complied with the *Community Charter*.

[27] The plaintiff has cited no legal authority in his NOCC or his Reply to support his proposition that Delta owed him a duty of care to ensure Mr. Kruger complied with the *Community Charter*. The plaintiff has not addressed whether this duty of care is an established duty of care or a novel one. In novel duty of care cases, the full two-stage *Anns-Cooper* framework applies: *Cooper v. Hobart*, 2001 SCC 79. That analysis provides that a duty of care is owed if: (1) the relationship is sufficiently proximate and harm to the plaintiff is a reasonably foreseeable consequence of the defendant's act;

and (2) there are no residual policy considerations that justify denying liability: *Cooper* at para. 30.

[28] In my view, the jurisprudence is clear the law does not recognize a tort of breach of statutory duty: *Wu v. Vancouver (City),* 2019 BCCA 23 at para. 43, citing *The Queen (Can.) v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205 and *Holland v. Saskatchewan*, 2008 SCC 42. Justice Harris in *Wu* concluded the City of Vancouver in delaying its decision on a development permit did not owe the homeowners a duty of care:

> [58] What I take from these broad principles is that, as a general proposition subject only to arguably rare exceptions, statutory duties owed by public authorities are insufficient to ground private law duties arising out of interactions that are inherent in the exercise of the public law duty. Indeed, it is difficult to convert public law duties into private law duties where those public law duties exist to promote a public good. Generally, discharging public law duties does not give rise to a private law duty of care to particular individuals.

[29] In *Vlanich v. Typhair*, 2016 ONCA 517, the court held a public authority does not owe a private law duty of care to a member of the public to ensure compliance with a licensing scheme: paras. 38–39.

[30] I do not agree with the plaintiff that whether a duty of care exists in these circumstances to ground a claim in negligence is a matter of evidence to be determined after trial. In my view, existing jurisprudence shows the courts have determined there is no such duty.

[31] Further, even accepting there may be a novel duty of care, the second step of the *Anns-Cooper* analysis must be considered. The second step of the analysis asks whether there is a residual policy concern lying outside the parties' relationship that should negate the *prima facie* duty of care, and particularly asks whether the law already provides a remedy. In this case, there are other remedies available which would weigh against finding such a duty. For example, the plaintiff has started an action for defamation against Mr. Kruger.

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[32] Further, municipal councils can internally take steps to address a breach of confidentiality. They can do so by ordering an investigation, and if a breach has been found, passing a resolution of censure and sanction against the member: *Dupont v. Port Coquitlam (City)*, 2021 BCSC 728 at paras. 20, 23; *Anderson v. Strathcona (Regional District),* 2024 BCCA 23 at para. 38. I have been referred to no cases which support the plaintiff's assertion that s. 117 of the *Community Charter* grounds a duty of care from the municipality to a member of the public who may be affected by the breach of confidentiality.

[33] There is no cause of action in negligence against Delta for any alleged failure to enforce s. 117 of the *Community Charter*. In my view, this cause of action in negligence is bound to fail. As a result, the underlined portions alleging a claim in negligence on this basis set out in Part 3 paras. 5 and 6 of the NOCC, and in the Reply at para. 6 ought to be struck pursuant to R. 9-5(1)(a).

[34] The plaintiff concedes the reference to the *in camera* meeting is only relevant to his cause of action in negligence against Delta, and not his action in defamation against Mr. Kruger. As I have found there is no cause of action in negligence against Delta for failing to enforce s. 117 of the *Community Charter*, the content of the *in camera* meeting is not relevant to any issue in the action. As such, the underlined portions at Part 1 paras. 7, 8 and 13 of the NOCC referencing that the plaintiff's dismissal was discussed at the *in camera* meeting, that the dismissal was a result of the meeting, that Mr. Kruger participated in the meeting and that Mr. Kruger was bound by confidentiality is not necessary and ought to be struck pursuant to R. 9-5(1)(b).

Should the plaintiff's appointment to examine the Mayor of Delta for discovery be set aside?

[35] Delta objects to the Mayor being selected as the representative for examination for discovery on the basis that the Mayor does not fall within one of the categories of individuals listed in R. 7-2(5)(c)(ii) of the *SCCR*. Further, Delta argues the Mayor as an elected official is not appropriate to be examined for discovery. Delta proposes the

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City Manager who communicated the dismissal to the plaintiff is the appropriate knowledgeable person to be examined.

[36] The plaintiff submits the Mayor does fall within the categories of R. 7-2(5)(c)(ii), as he is a former employee of Delta, an officer of Delta and an agent of Delta. The Mayor was the Chief Administrative Officer of Delta from 2001 until he was elected Mayor in 2018, making him a former employee. The Mayor is the chief executive officer of Delta pursuant to s. 116(1) of the *Community Charter*. The plaintiff argues the Mayor is also an agent of Delta, as it was the Mayor who has represented Delta to the plaintiff during his employment with the city.

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<u>Legal Framework</u>

[37] Rule 7-2(5) states the following:

> **Examination of party that is not an individual**
>
> (5) Unless the court otherwise orders, if a party to be examined for discovery is not an individual,
>
> (a) the examining party may examine one representative of the party to be examined,
>
> (b) the party to be examined must nominate as its representative an individual, who is knowledgeable concerning the matters in question in the action, to be examined on behalf of that party, and
>
> (c) the examining party may examine
>
> (i) the representative nominated under paragraph (b), or
>
> (ii) any other person the examining party considers appropriate and who is or has been a director, officer, employee, agent or external auditor of the party to be examined.

[38] The party conducting an examination for discovery of a party that is not an individual may examine any person the party considers appropriate if the person falls within one of the categories of persons in R. 7-2(5)(c)(ii): a person who is or has been a director, officer, employee, agent or external auditor.

[39] The examining party has the right to choose who it wishes to examine for discovery. In *Rossco Ventures Ltd. v. British Columbia,* 2007 BCCA 36, the Court described this right:

> [9] It must be accepted that the examining party has the right to choose who it wishes to examine for discovery under the rule: *MacMillan Bloedel Ltd. v. Binstead* (1981), 1981 CanLII 519 (BC CA), 29 B.C.L.R. 9 (C.A.), and *British Columbia Lightweight Aggregate Ltd. v. Canada Cement Lafarge Ltd.* (1978), 1978 CanLII 372 (BC CA), 7 B.C.L.R. 108 (C.A.). If it were otherwise, serious injustice could result. It is not a matter of any discretion being exercised by the court: *Karl's Sporthaus Ltd. v. Allstate Insurance Co. of Canada* (1983), 1983 CanLII 385 (BC CA), 44 B.C.L.R. 169 (C.A), although the court always retains the power to intervene where an abuse of its process may unfairly prejudice a litigant: *Penderville Apts.* Further, while one of the functions of discovery is to permit the examining party to obtain admissions binding upon the party being examined, in *Karl's Sporthaus*, at page 171, this Court stated:
>
>> An important purpose, also, is to obtain information relating to the matters in issue. This information may tend to narrow and define the issues between the parties even though it may not necessarily be binding. It has been said countless times that an examination for discovery is a searching cross-examination limited to the issues raised by the pleadings. Such examination properly conducted will tend to reveal the strength and weakness of each party's case and will tend, therefore, to limit and define the issues.

[40] However, the court does have discretion to override the examining party’s choice of representative if the objecting party demonstrates overwhelming prejudice: *MacDonald v. Roth et al*, 2000 BCSC 1670 at para. 34; *R.A.B. Properties Ltd. v. Canadian Horizons (182A) Development Corp.*, 2022 BCSC 1716 at para. 93.

Analysis

Does the Mayor fall into one of the categories of persons who can be examined for discovery?

[41] The plaintiff argues the Mayor is a former employee or officer of Delta, a current officer of Delta as its Chief Executive Officer, and an agent for Delta.

[42] With respect to the plaintiff’s argument that the Mayor qualifies as a former employee, in my view the Mayor is not within the category of a former employee for the purpose of examination for discovery in this action. The determination of who can be examined for discovery must be done in the context of the pleadings. In this case,

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the pleadings state the Mayor was elected in 2018, and the plaintiff was hired after the civic election. The plaintiff had run unsuccessfully as the Mayor's running mate. The Mayor was not a former employee during the period of time when the plaintiff was working for Delta.

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[43] With respect to the plaintiff's argument that the Mayor is an officer or agent of Delta, the plaintiff has cited no authority that an elected official falls into one of the categories of persons who can be examined for discovery on behalf of a party who is not an individual. Delta has cited two cases where a proposed examination for discovery of a mayor was set aside by the courts.

[44] In *Vaughan (City) v. Ruffolo*, [2009] O.J. No. 3107, the Ontario Superior Court found a mayor was not an "officer" for the purpose of examination for discovery. The court in *Vaughan (City) v. Ruffolo* explained its rationale:

> [11] However, counsel for the city has referred me to the *Law of Canadian Municipal Corporations*, (second edition) by Ian Rogers. In that text, Mr. Rogers states:
>
> > "like other members of council **the mayor has no authority to act for the corporation, except in conjunction with other persons constituting a quorum** and in giving an undertaking that the municipality will perform an act, he [sic]cannot bind Corporation or its council" (emphasis added)
>
> [12] It seems to me that in the circumstances of an action against a municipality, it is obvious that the individual produced on discovery must be in a position to bind the party he or she is representing. Based on my understanding of the *Act* the mayor does not have that authority.
>
> [13] One of the main purposes of discovery is to obtain admissions which will be binding at trial upon the party whose witness is being examined for discovery. It would seem that unless both the witness and counsel for the party for whom they are testifying agree that their evidence will be binding upon the municipality, an elected individual ought not to be the witness examined.

[45] Another decision dealing with the proposed examination for discovery of a mayor is *Vincent v. Saint John (City),* [2001] N.B.J. No. 442. The plaintiff was a property owner who purchased property from the city. He brought an action for misrepresentation against the city. The plaintiff had in excess of 50 meetings with various city officials and attended city council meetings and planning advisory meetings. The plaintiff believed his discussions with the mayor had "special

significance and importance”: *Vincent v. Saint John (City)* at para. 4. The plaintiff wanted to examine the mayor as the representative of the city for discovery. The city opposed, arguing that any statements made by the mayor would not be binding on the city, citing *Porky Packers Ltd. v. Town of the Pas*, [1977] 1 S.C.R. 51 at para. 3. The court found the mayor was not the appropriate person to be examined but that after discovery of another city official, the plaintiff could apply to examine the mayor not as a representative of the city but as a witness, if there were some particular details of conversations between them.

[46] The courts in *Vaughan (City) v. Ruffolo* and *Vincent v. Saint John (City)* found a mayor did not fall into the categories of persons who can be examined for discovery on behalf of the municipality as a mayor had no ability to bind the city by his evidence. Further, Ontario had similar legislation describing a mayor as the chief executive officer of a municipality: *Municipal Act, 2001*, S.O. 2001, c. 25 at s. 225. Despite this, the court in *Vaughan (City) v. Ruffolo* found a mayor did not fall under the class of “officer” for the purpose of discovery: *Vaughan (City) v. Ruffolo* at paras. 9–13, 24.

[47] In my view, the reasoning in *Vaughan (City) v. Ruffolo* and *Vincent v. Saint John (City)* applies in this case. Any statements made by the Mayor during discovery cannot bind Delta. Delta can only exercise its authority by its council through resolutions or bylaws. Pursuant to s. 114 of the *Community Charter*, the powers, duties and functions of a municipality are to be exercised and performed by its council. The Mayor has no independent ability to make decisions for council, and can only act within the constraints of the *Community Charter*. The municipality can only exercise its authority by resolution or bylaw, pursuant to s.122(1) of the *Community Charter*. An act of council is not valid unless it is authorized or adopted by bylaw or resolution at a council meeting: *Community Charter*, s. 122(4). It is clear that any statements or acts made or done by the Mayor is not binding on Delta, unless it is approved by council through a bylaw or resolution. In my view, in the circumstances here, it cannot be said that the mayor is an agent or officer of Delta in a representative capacity for the purpose of discovery.

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[48] In the absence of authority that an elected official falls into one of the categories of persons who can be discovered, and considering the two cases that have dealt with the issue and found to the contrary, I do not find the Mayor falls into the categories of persons who can be discovered.

Should the Mayor be examined for discovery?

[49] If I am wrong and the Mayor does fall into one of the categories of individuals who can be examined for discovery, I would exercise my discretion and find the Mayor ought not be discovered.

[50] In *British Columbia Teachers' Federation v. British Columbia*, 68 B.C.L.R. 319, 1985 CanLII 304 (BCSC), the government sought to set aside an appointment to examine the Minister of Education in constitutional litigation challenging legislation excluding teachers from collective bargaining rights. Chief Justice McEachern, as he then was, granted the application to set aside the examination of the Minister of Education:

> [20] In my view, this question must be decided upon a consideration of the law relating to discovery, even though there are strong policy reasons why ministers should not, except in very special cases, be examined personally. Ministers are not defendants in the usual sense. Neither, in my view, are they directors, officers, employees or agents of the Crown for the purposes of R. 27… Rather, they are nominal parties unless there are specific allegations to the contrary, and there is so much Charter litigation that ministers cannot be expected to submit to discovery which may be endless unless there are powerful reasons justifying such a procedure…
>
> …
>
> [22] Thus, although the plaintiffs have a prima facie right to examine a defendant party, that right may be displaced under R. 27(4) upon showing that some other person should be examined…
>
> …
>
> [24] In place of the minister, the defendants have offered a knowledgeable alternative. I have no hesitation in concluding that the minister should not be examined. In fact, I do not think any minister should be examined in a constitutional challenge unless it can be shown that he has particular knowledge that cannot be obtained from some other witness. I would not exclude the possibility that it may be necessary to conduct a second examination, possibly of a minister, if the examination of some other officer of the Crown proves unsatisfactory, but that is not the question before me.

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[51] In *Trial Lawyers Association of British Columbia v. British Columbia*, 2025 BCSC 311, the plaintiffs sought to examine for discovery the Honourable David Eby, the premier of B.C., in the context of litigation about the validity of the *Legal Professions Act*, S.B.C. 2024, c. 26 (“*LPA*”). The plaintiffs sought to examine the premier, arguing he was directly involved in the development of the *LPA* in his role as premier and his past role as the attorney general, and would be able to answer questions on considerations of the legislation’s impact on the independence of the Bar: *Trial Lawyers Association of British Columbia v. British Columbia* at para. 16. Chief Justice Skolrood found the general principles from *British Columbia Teachers’ Federation v. British Columbia* on examination of Crown Ministers applicable. The Chief Justice endorsed the approach by the Alberta Court of Appeal in *Forsyth v. LC*, 2024 ABCA 14 at para. 23, holding the party seeking to examine for discovery a Minister needs to show “special circumstances” and that the Minister be the best person to respond. The Chief Justice found this approach to be appropriate in constitutional cases:

> [27] I do not view this approach as a departure from the general rule that an examining party has the right to choose the witness to be examined, subject only to the opposing party establishing “overwhelming prejudice”. Rather, it reflects the principles referred to by Justice Rice in *BCTF 2008* at para. 80 concerning the separate roles of the legislative and executive branches of government and the prejudice that would arise if constitutional cases were turned into “political theatre” by compelling Ministers to testify, outside of the narrow circumstances referred to above, about the motivations of government in introducing legislation.

[52] While the case at bar is not constitutional litigation, in my view the comments of the Chief Justice on discovery of Ministers in constitutional litigation apply to discovery of municipal elected officials in private litigation.

[53] The plaintiff argues the Mayor was his boss; he argues the Mayor recruited him, negotiated the employment contracts, and managed the plaintiff’s work day to day. The plaintiff argues the Mayor was responsible for the decision to terminate his employment, and was involved in the decision to repudiate the plaintiff’s employment contract. The plaintiff argues he wants to ask the Mayor why Delta repudiated the employment contract by demanding that the plaintiff sign a release before receiving a

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severance payment, whether Delta breached its duty of good faith and fairness in his dismissal by repudiating his contract, by being dishonest with him about the termination, and by failing to prevent Mr. Kruger from making defamatory statements about him; and whether Delta breached its duty to perform its contractual obligations to the plaintiff honestly by repudiating his contract and being dishonest with him about the termination.

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[54] In my view, these are not special circumstances which would justify the examination of the Mayor. In essence, the plaintiff's claim against Delta is his dismissal, and not any other employment related issue. It must be remembered this was a termination without cause. As such, the reasons for the termination are not relevant. Whether an insistence by the city for the plaintiff to sign a release before severance was paid was a repudiation of the contract is an issue for trial. I do not see how the evidence of the Mayor would have anything to do with the determination of that issue, as he was not involved in communicating the dismissal or negotiating the release. As for the issues of whether Delta breached its duty of good faith, honesty and fairness in termination, that is to be determined by an assessment of how the termination was carried out. That was not done by the Mayor. It was done by the City Manager, Mr. van Dyk.

[55] In these circumstances, I find there would be overwhelming prejudice if the Mayor was examined for discovery.

<u>Conclusion</u>

[56] The defendants' application to strike portions of the plaintiff's NOCC and reply is granted.

[57] The appointment to examine for discovery the Mayor is set aside. I grant Delta's application to substitute Mr. van Dyk as its representative.

[58] Costs of these applications will be in the cause.

"Chan J."

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